



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 28, 1994

Honorable Ronald Kirk
Secretary of State
P.O. Box 12697
Austin, Texas 78711-2697

Letter Opinion No. 94-075

Re: Proper construction of Attorney General
Opinion JM-988 (1988) (ID# 30083)

Dear Secretary Kirk:

You inform us that you have received a request for an election law opinion from a state representative regarding the proper construction of section 65.009 of the Election Code. That section governs the counting of irregularly marked ballots.¹ You express concern that a prior opinion of this office, Attorney General Opinion JM-998 (1988), which answered two questions regarding the counting of ballots on which a voter indicated a straight-party vote for two political parties, circumscribes your authority to issue an election law opinion construing this particular Election Code provision. Specifically, you are concerned that the following sentence precludes your answering the state representative's request: "Neither the secretary of state nor any other authority is authorized to declare the manner in which an ambiguous or imperfectly marked ballot is to be counted." Attorney General Opinion JM-998 at 6. Consequently, you ask about the proper construction of that opinion.

We conclude that Attorney General Opinion JM-998 reaches only the authority of the secretary of state to promulgate rules directing that ballots not marked in strict conformity with the law be counted a certain way. The opinion does not address whether your office is without authority to issue advisory opinions designed to "assist and advise all election authorities with regard to the application, operation, and interpretation" of

¹Section 65.009 of the Election Code provides the following:

- (a) Failure to mark a ballot in strict conformity with this code does not invalidate the ballot.
- (b) Marking the ballot by marking through the names of candidates for whom or the statements beside the propositions for which the voter does not desire to vote does not invalidate the ballot.
- (c) A vote on an office or measure shall be counted *if the voter's intent is clearly ascertainable* unless other law prohibits counting the vote. [Emphasis added.]

election law. Elec. Code § 31.004 (setting forth authority of secretary of state to issue advisory opinions).² Before we address the authority of your office to issue advisory election law opinions, we will turn to the attorney general opinion about which you are concerned.

In Attorney General Opinion JM-998, the chair of the Elections Committee of the House of Representatives asked about the proper way to count ballots in two instances in which a voter indicates a straight-party vote for two political parties. The situations about which the requestor asked were among those listed in the secretary of state's published guidelines, a handbook for election judges and clerks. The opinion noted that an earlier secretary of state sought approval of the original handbook in a request for an attorney general's opinion. That opinion, Attorney General Opinion M-284 (1968), concluded that the secretary of state's authority to promulgate rules, while broad under what is now section 31.003 of the Election Code,³ was limited by what is now section 65.009(c) of the code to those situations in which the voter's intent is "clearly ascertainable":⁴

After careful consideration of the original ballot counting rules, then Attorney General Crawford Martin concluded that the secretary of state was only authorized to promulgate rules that illustrated statutorily expressed counting provisions. Regarding the rules that illustrated ballots not marked in conformity with the law, this office

²Section 31.004 of the Election Code provides the following:

(a) The secretary of state shall assist and *advise* all election authorities with regard to the application, operation, and *interpretation of this code* and of the election laws outside this code.

(b) The secretary shall maintain an informational service for answering inquiries of election authorities relating to the administration of the election laws or the performance of their duties. [Emphasis added.]

³Section 31.003 of the Election Code provides the following:

The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws. [Emphasis added.]

⁴That opinion concluded that

we cannot sanction directives promulgated by the Secretary of State . . . unless as a matter of law, based upon the fact situation presented, reasonable minds could not differ in the application of a chosen rule to that specific fact situation.

Attorney General Opinion M-284, at 7.

concluded that it could not as a matter of law say that the "rules contained no questions of fact about which reasonable minds could not differ." Accordingly, the attorney general refused to sanction those rules.

We agree with the earlier opinion of this office that it is the responsibility of the election judge, initially, and the trier of fact in an election contest, ultimately, to examine the ballots to determine the intent of the voter. The secretary of state's interpretive responsibility under section 31.003 of the Election Code *does not authorize the secretary of state to prescribe rules* for counting ballots that are marked in such a manner as to allow for multiple interpretations of voter intent.

Attorney General Opinion JM-998 at 5-6 (footnote omitted; emphasis added).

While noting that the secretary of state is without power to promulgate rules in this area, the opinion did mention various factors that an election judge could consider in determining whether the voter's intent is "clearly ascertainable":

If the statute provides specific instruction in the counting of a ballot, it is to be followed. In all other instances, the determination of voter intent must be left to the determination of the election judge. *Neither the secretary of state nor any other authority is authorized to declare the manner in which an ambiguous or imperfectly marked ballot is to be counted.*

Neither the secretary of state nor any other officer attempting to issue an anticipatory counting rule is in the position of an election judge. The judge will be confronted not only with the actual markings on the ballot but may also consider circumstances such as the text of the instructions printed on the ballot (or the absence thereof), the ballot format and layout, the method of voting used in the election, and other factors about which a rule-maker cannot be cognizant during the rule-making process.

Attorney General Opinion JM-998 at 6-7 (emphasis added).

The opinion did not address whether, much less conclude that, the secretary of state's authority to issue advisory opinions under section 31.004 of the Election Code is likewise limited by the language of section 65.009 (c) of the code. We know of no reason why it should be. An advisory opinion is just that--advisory--and an election official is not bound by its provisions. But an administrative rule is different, and, in this instance, you may not promulgate a rule *directing* that a ballot be counted in a certain way under certain circumstances. You may, however, issue an advisory opinion suggesting factors that an

election law judge may consider in determining whether the intent of the voter is "clearly ascertainable." Consequently, we conclude that Attorney General Opinion JM-998 does not preclude your issuing an election law opinion advising on the interpretation of Election Code provisions, including section 65.009 of the Election Code.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Sarah J. Shirley", written over a circular stamp or seal.

Sarah J. Shirley
Assistant Attorney General
Opinion Committee